

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MARLOWE FREEMAN :
 :
 v. : Case No. PF-C-10-102-E
 :
 CITY OF CHESTER :

FINAL ORDER

Marlowe Freeman (Complainant) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on January 6, 2011, challenging a Proposed Decision and Order (PDO) issued on December 17, 2010. In the PDO, the Board's Hearing Examiner concluded that the City of Chester (City) did not violate Section 6(1)(a), (c) or (d) of the Pennsylvania Labor Relations Act (PLRA), as read in pari materia with Act 111 of 1968.¹ The City timely filed a brief in opposition to the exceptions on January 24, 2011.

The facts of this case are summarized as follows. The Complainant is one of six police bargaining unit members who are plaintiffs in a duty of fair representation suit (DFR suit) filed in the Court of Common Pleas of Delaware County against their union, the Fraternal Order of Police, Lodge 19 (FOP), and the City to compel them to proceed to arbitration on grievances filed by the bargaining unit members regarding the elimination of the narcotics unit and the creation of the anti-crime unit. According to the Court docket, the DFR suit was filed on March 3, 2010. The City's attorney filed an appearance with the Court on April 1, 2010.

The Complainant filed a Charge of Unfair Labor Practices on July 6, 2010, alleging that the City violated Section 6(1)(a), (c) and (d) of the PLRA and Act 111 by retaliating against him for filing the DFR suit. The Complainant set forth eight specific instances of alleged retaliation by the City as follows:

1. Launching an investigation of the Complainant on April 8, 2010 regarding a domestic dispute;
2. Issuing a written reprimand to the Complainant on April 15, 2010 for alleged conduct unbecoming a police officer related to the manner in which he answered the police intercom;
3. Issuing a written reprimand to the Complainant on April 7, 2010 for an alleged refusal to accept an assignment;
4. Sending the Complainant home from work on October 16, 2009 and docking him for a day's pay;
5. Suspending the Complainant on January 19, 2010 for three days allegedly for the same incident as set forth in #4 above;
6. Suspending the Complainant without pay for five days on June 3, 2010;
7. Refusing to provide the Complainant with a reasonable accommodation related to his disability; and
8. Creating a hostile work environment for the Complainant.²

¹ The Complainant withdrew his allegation of a violation of Section 6(1)(d) of the PLRA at the hearing in this matter.

² Section 9(e) of the PLRA provides that no charge shall be entertained which relates to acts which occurred or statements which were made more than six weeks prior to the filing of the Charge of Unfair Labor Practices. 43 P.S. § 211.9(e). Several of the Complainant's alleged instances of retaliation occurred in April 2010 or earlier. Indeed, several of the allegations of discrimination occurred prior to the filing of the DFR suit. Because these alleged instances of retaliation occurred more than six weeks prior to the filing of the Charge, they are untimely.

A hearing was held before the Board's Hearing Examiner on August 16, 2010, during which all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner concluded that the Complainant did not meet his burden of proving discrimination in violation of Section 6(1)(a) and (c) of the PLRA because the Complainant failed to establish that Deputy Chief Darren Alston and Captain Joseph Massi, the individuals who allegedly took the adverse actions against him, were aware of the filing of the DFR suit. Therefore, the Hearing Examiner dismissed the Complainant's Charge of Unfair Labor Practices.³

The Complainant alleges in the exceptions that the Hearing Examiner erred in concluding that he failed to establish that the City was aware of his filing of the DFR suit because the Complainant testified that he served the complaint on the City before any disciplinary action was taken and the City's attorney filed an appearance in the DFR suit on April 1, 2010. The Complainant further alleges that the record reflects that Deputy Chief Alston and Captain Massi were aware that the DFR suit had been filed.

In order to sustain a charge of discrimination under Section 6(1)(a) and (c) of the PLRA, the charging party must prove (1) that the employee engaged in protected activity, (2) that the employer was aware of the employee's protected activity, and (3) that the employer took adverse action against the employee because of a discriminatory motive or anti-union animus. FOP, Lodge No. 5 v. City of Philadelphia, 38 PPER 184 (Final Order, 2007) (citing St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977)). The charging party must demonstrate that all three elements are present in order to establish a prima facie case under Section 6(1)(a) and (c) of the PLRA. Colonial Food Service Educational Personnel Association v. Colonial School District, 36 PPER ¶ 88 (Final Order, 2005).

The Complainant testified that he served the City with a copy of the DFR suit before any disciplinary action was taken against him. The record also reflects that the City's attorney filed an appearance in the DFR suit on April 1, 2010. However, this evidence does not demonstrate that the individuals who disciplined the Complainant, Deputy Chief Alston and Captain Massi, were aware of the DFR suit at the time he was disciplined.

Further, a review of the record does not establish that Deputy Chief Alston and Captain Massi were aware of the DFR suit at the time that the Complainant was disciplined. Deputy Chief Alston testified on cross-examination as follows:

Q Are you familiar with the fact that Mr. Freeman and other police officers filed a lawsuit naming [the City] as a defendant in connection with your decisions to disband the narcotics unit and create the anti-crime unit?

A Yes, sir, I am familiar with that also.

Captain Massi testified on cross-examination as follows:

Q You're familiar with the grievances that Officer Freeman and other officers filed regarding the disbandment of the narcotics unit and the creation of the anti-crime unit; isn't that correct?

A Yes.

Although Deputy Chief Alston testified that he was aware of the DFR suit at the time of the hearing in August 2010, no evidence was presented to show that Deputy Chief Alston was aware of the DFR suit at the time that the Complainant was disciplined. Further,

³ The Hearing Examiner only based his decision on a determination that the Complainant failed to establish that Deputy Chief Alston and Captain Massi were aware of the filing of the DFR suit. The Hearing Examiner did not decide whether the filing of the DFR suit constituted protected activity under Act 111 and the PLRA. Similarly, the Board need not determine whether the filing of the DFR suit constituted protected activity.

Captain Massi only testified that he was aware of the grievances that were filed by the Complainant. However, the record is devoid of any evidence demonstrating that Captain Massi was aware of the filing of the DFR suit at the time that the Complainant was disciplined.⁴ Therefore, the Hearing Examiner properly concluded that the Complainant failed to meet his burden of proving all three elements of a prima facie case of discrimination. See Teamster Local #764 v. Montour County, 35 PPER 147 (Final Order, 2004) (no discrimination found where union failed to establish that employer was aware of employe engaging in protected activity at the time employe was disciplined).

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Pennsylvania Labor Relations Act and Act 111, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Marlowe Freeman are dismissed and the December 17, 2010 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman and James M. Darby, Member, this twenty-sixth day of April, 2011. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

⁴ The Charge filed on July 6, 2010, alleged discrimination based upon the Complainant's filing of the DFR suit. The Complainant attempted to amend his Charge at the hearing to include an allegation that the City retaliated against him for filing the grievances underlying the DFR suit. The Hearing Examiner denied the Complainant's request to amend the Charge because the attempted amendment was made past the six week statute of limitations under Section 9(e) of the PLRA. The Complainant has not filed exceptions to the Hearing Examiner's denial of the amendment.